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No. 93-1154

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

In re: CONTINENTAL AIRLINES, INC., *et al.*,

Debtors.

PATRICIA BEER, MANAGER OF REVENUE OF THE CITY AND COUNTY OF DENVER, COLORADO,

Petitioner,

v.

CONTINENTAL AIRLINES, INC., *et al.*,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANCES A. KONCILJA, ESQ.
(Counsel of Record)
PETER C. FORBES, ESQ.
KONCILJA & ASSOCIATES, P.C.
1700 Broadway, Suite 2050
Denver, Colorado 80202
Telephone: (303) 832-2110
Facsimile: (303) 832-2623

Attorneys for Respondent, Continental Airlines, Inc.

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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Continental Airlines, Inc. ("Continental" or "Respondent"), through the undersigned counsel, submits this Brief In Opposition to the Petition for Writ of Certiorari filed by the City and County of Denver ("Denver" or "Petitioner") to review the judgment of the United States Court of Appeals for the Third Circuit (the "Court of Appeals"). The Court of Appeals resolved the issue before it by applying controlling state law. Petitioner has

not alleged grounds which justify this Court exercising its discretion. The Writ should be denied.

Statement of Facts

This case arises from Petitioner's attempt to collect three months of use taxes from Continental Airlines pursuant to a city ordinance in effect for only six months and superseded more than two years ago. That ordinance used the word "facility" without providing a definition. The question of statutory interpretation decided by the Court of Appeals was whether the word "facility" was limited to one building, as Denver urges, or whether it included a complex of buildings, as dictionary and state law definitions provide.

The ordinance in question is an artifact of Petitioner's attempt to enact legislation that would enable Petitioner to offer a tax incentive to United Airlines while avoiding a state constitutional prohibition against special legislation. The issues raised by the Petition, which have already been addressed by three federal courts, are truly *sui generis*, are limited to questions of statutory construction under state law, and do not in any way implicate federal law or policy. Moreover, any state law question is moot because Petitioner has amended the ordinance to specifically define a qualifying facility. Thus, review by this Court is neither necessary nor warranted.

In February 1991, Denver enacted Municipal Ordinance No. 75 granting a limited exemption from Denver's use tax (Denver Revised Municipal Code § 53-92, Appendix I, at I1) for certain goods used at a facility owned by a

transportation utility which met certain criteria: location in an enterprise zone, at least one million square feet of usable floor space, and the regular place of reporting for at least 2,000 employees. *See* Appendix F at F2. (For an explanation of the relationship between sales and use tax in Denver's Municipal Code and the procedures for paying the tax, which is self assessed monthly, see the Court of Appeals decision, Appendix A, at A4-A7.)

The stimulus for the ordinance was Denver's desire to entice United Airlines to build a new maintenance facility in Denver. Appendix C at C26-C27. Because the state constitution prohibits special legislation, however, (*Colorado Constitution, Article II, Section 11*), Denver could not explicitly limit the proposed use tax exemption to United. Accordingly, Denver attempted to draft around the constitutional prohibition through the device of enacting legislation undoubtedly applying to United's proposed maintenance facility, but that also, to outward appearances, would apply equally to other taxpayers.

Although Denver's motivation may have been its desire to obtain a new maintenance facility, the language actually used in the ordinance originally enacted by Petitioner did not restrict the exemption either to new facilities or to maintenance facilities. Nor did it restrict the exemption to a facility consisting of a *single* building meeting certain square footage and employee reporting requirements. Rather, the ordinance as originally enacted, broadly provided that the exemption would be available for sales of tangible personal property "to a transportation utility to be used, consumed, stored or distributed at a facility" which was first "located within an enterprise zone"; second, "contains at least one million (1,000,000)

square feet of usable space" and third, that "serves as a headquarters or regular place of reporting for duty for at least two thousand (2,000) employees in the third year of operations of the facility and continually thereafter." (*See* Appendix F at F2.)

Continental met all of these requirements. Accordingly, on June 20, 1991, respondent Continental Airlines filed a local use tax return claiming entitlement to the exemption. Continental's claim was based on the fact that it was a transportation utility whose Colorado facility (which concededly consisted of several buildings) was located in an enterprise zone, contained at least one million square feet of usable floor space, and was home to at least 2,000 employees.

Within two months of receiving notice Continental was claiming the exemption, Denver repealed the original ordinance and enacted two new ordinances. These new ordinances substantially changed the criteria for claiming the use tax exemption.[1] No longer was it sufficient for a

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[1] The council appears to have passed two new ordinances, rather than one, because of its desire both to eliminate retroactively the exemption granted by the original ordinance and to ensure that the modified eligibility criteria would apply prospectively. Thus, the first of the two new ordinances, which was styled a "clarification" of the original ordinance, (*See* Ord. No. 568 at Appendix G), repealed the original ordinance and ostensibly "clarified" the council's intention that the definition of a qualifying facility contained in the original ordinance (which did not contain the requirements that the facility be new, etc.) was actually intended to be the same as the definition of a qualifying facility contained in the new ordinance (which did contain the requirements that the facility be new, etc.) (*See* Ord. No. 571 at Appendix H.)

The second of the two new ordinances simply extended the new definition of a qualifying facility into the future. Because

transportation utility to have a facility in an enterprise zone that met the requisite square footage and employee reporting requirements. Now, the exemption was only applicable to a *new* facility having a *single building* with at least one million square feet of usable floor space on a single level and which was used primarily for maintaining equipment used in interstate transportation. (*See* Appendix G & H.) In addition, Denver changed other portions of the ordinance which further narrowed its application from tangible personal property to "sales of machinery, tools & equipment . . . " (*See* Appendix G at G2.) This appears to have been done to delete aviation fuel from the use tax exemption.

The new ordinances became effective on August 8, 1991. Prior to that date, Continental filed amended use tax returns seeking a refund of the use taxes it had paid for the three months between February 1, 1991 (when the original ordinance became effective) and May 1, 1991 (when Continental began claiming the exemption).

Following receipt of Continental's amended returns, Denver invoked the jurisdiction of the United States Bankruptcy Court for the District of Delaware and filed a motion seeking payment of the withheld taxes as an administrative expense pursuant to 11 U.S.C. § 503. Continental responded with a cross-motion requesting an

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Continental agrees that Denver had the power to change the scope of the exemption prospectively, and because Continental agrees that it did not qualify for the exemption under the revised eligibility criteria, the second new ordinance was not at issue below.

order first determining that it was eligible for the exemption under the original ordinance, and then requiring Denver to either refund the use taxes Continental had unnecessarily paid during the first three months the exemption was in effect or, in the alternative, grant Continental a credit for that amount.[2]

After providing the parties with an opportunity for discovery and briefing, the bankruptcy court held a hearing on the motion and cross-motion on October 24, 1991. The parties stipulated to most of the relevant facts (*See* Appendix J; Appendix D at D4; Appendix A at A12.) On the question of statutory interpretation, Denver's position was that the court should look at extrinsic evidence in the form of council resolutions, economic impact studies and the like in order to determine the meaning of the term "facility" in the original ordinance. (*See* Appendix A at A10.) According to Denver, the extrinsic evidence it sought to proffer demonstrated conclusively that the term "facility" in the original ordinance was intended to refer only to a single new building used primarily for maintenance that also satisfied the enterprise zone, square footage, and employee reporting requirements.

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[2] The question of whether the bankruptcy court had jurisdiction over Continental's refund claim under 11 U.S.C. § 503 was fully addressed below. The Court of Appeals ultimately concluded that jurisdiction was proper under § 503, but held that Continental was not entitled to a refund because it had failed to comply with Denver's administrative procedures.

The lower court rulings concerning the scope of 11 U.S.C. § 503 and Continental's entitlement to a refund have not been presented to the Court for review. Accordingly, this Statement will not address those issues.

(*See* Appendix C at C26-C27.) In the alternative, Denver argued that even if the term "facility" in the original ordinance could be construed to encompass a multi-building facility, Continental did not meet the square footage requirements because, although Continental leased more than one million square feet of usable space, some of that space had been subleased and other space was not then currently being used by Continental. Thus, according to Denver, the facility Continental was actually using in fact had less than one million square feet of usable space. (*See* Appendix D at D14.) Finally, Denver asserted that the August 1991 ordinance that purported to clarify the definition of an eligible facility contained in the original ordinance did not violate the state constitutional prohibition against retroactive legislation. In Denver's view, under state law it had the power to eliminate tax exemptions retroactively, at least before a tax year was closed. Moreover, according to Denver the second ordinance was merely "clarifying" legislation and as such did not constitute retroactive legislation within the meaning of the state constitution. (*See* Appendix A at A14-A17.)

The Bankruptcy Court analyzed the questions under Colorado law, which both parties agree is controlling. The court found that – like most states – Colorado's approach to statutory construction is grounded in the plain meaning rule. Specifically, the Court found that under Colorado law, where the language of a statute or ordinance is unambiguous, it would be inappropriate to read qualifications into the statute or ordinance on the basis of extrinsic materials. Rather, the meaning of the statute or ordinance is to be determined by looking at the language

actually used in the legislation and giving that language its ordinary meaning. (*See* Appendix D at D12) *citing City of Littleton v. Board of County Commissioners*, 787 P.2d 158, 161 (Colo. 1990) *and* Colo. Rev. Stat. Ann. § 2-4-101(1991).

Applying Colorado's plain meaning rule, the Bankruptcy Court found that it would be inappropriate to limit the exemption created by the original ordinance solely to a new maintenance facility having a single building containing at least one million square feet of usable space precisely because Denver had *not* included those qualifications in the ordinance it had originally enacted. Giving the term "facility" its ordinary and common meaning, a multi-building complex used jointly by a company for the purpose of accomplishing a common task was plainly a "facility". Thus, as a matter of law, Continental's multi-building complex was a "facility" within the meaning of the original ordinance. (*See* Appendix D at D12-D14.)

The Bankruptcy Court also relied on the plain meaning rule to reject Denver's argument that the square footage requirement in the original ordinance required the exclusion of subleased and unused space. Again, because the language used in the original ordinance did not exclude subleased and unused space in defining a qualifying facility, the "space actually used" qualification urged by Denver was in effect an attempt to use extrinsic evidence in order to read limiting language into the statute. Thus, because the parties agreed that the space Continental leased for its facility exceeded the minimum square footage specified in the statute, and also agreed that Continental's facility was located in an enterprise

zone and met the employee reporting requirements, Continental was eligible for the exemption under the plain meaning of the original ordinance. (*Id.* at D13-D14.)

With respect to the supposed "clarifying" ordinance, the bankruptcy court found that, when stripped of rhetoric, the alleged "clarifying" ordinance was nothing more than an attempt to tax a transaction that had been tax-free when completed. The court then held that such an attempt constituted retroactive legislation within the meaning of the state constitutional prohibition. Accordingly, the court found that the "clarifying" ordinance could not retroactively deprive Continental of the use tax exemption to which it was entitled under the original ordinance. *Id.* at D16-D18 (*relying on California Co. v. Colorado*, 141 Colo. 288, 348 P.2d 382, 399 (1959), *app. dismissed*, 364 U.S. 285 (1960) and *Van Sickle v. Boyes*, 797 P.2d 1267, 1270-71 (1990)).

After being rebuffed by the Bankruptcy Court, Denver appealed to the district court. On appeal, the district court found that Continental was not entitled to the exemption for three reasons. First, the district court found that the term "facility" was ambiguous, and that accordingly Colorado law permitted resort to extrinsic evidence of legislative intent. (*See* Appendix C at C25.) In the district court's view, the extrinsic evidence proffered by Denver supported its argument that the term "facility" in the original ordinance was intended to apply only to a new maintenance facility consisting of a single building containing at least one million square feet of usable space. (*Id.* at C27.) Second, the district court held that even if a multi-building facility could fall within the definition of "facility" used in the ordinance, Continental

would not be eligible for the exemption. In the district court's view, Continental's facility did not satisfy the square footage requirement in the original ordinance because Continental's decision to sublease part of its leasehold and leave other portions unused meant that the multi-building facility actually being used by Continental contained less than one million square feet of usable space. (*Id* at C30.) Finally, focusing on a requirement in the original ordinance that had not been addressed by the bankruptcy court, the district court found that a condition precedent to claiming the exemption was the taxpayer's creation of a reserve fund into which the tax savings were to be deposited. In the district court's view, Continental's failure to establish such a fund meant it was not eligible for the exemption. (*Id.* at C32-C33.) Because the district court found that Continental did not qualify for the exemption under the original ordinance, it did not reach the question of retroactivity. (*Id.* at C32-C33.)

Continental then appealed to the Third Circuit. In an unreported opinion, the Court of Appeals reversed and held the district court had misread the Colorado authorities concerning application of the plain meaning rule. Under Colorado law, the district court's decision to go beyond the common meaning of the term "facility" and engraft limitations gleaned from extrinsic sources was improper. (*See* Appendix A at A10-A13 *citing, inter alia, Kane v. Town of Estes Park*, 786 P.2d 412, 415 (Colo. 1990) (*en banc*), *Triad Printing Co. v. Blair*, 812 P.2d 638, 644 (Colo. 1991) (*en banc*), and *Catholic Archdiocese of Denver v. City and County of Denver*, 741 P.2d 333, 337 (Colo. 1987)

(*en banc*)). Using the common meaning of the term "facility" as required by Colorado law, the Court of Appeals found that Continental's multi-building complex was a qualifying facility within the plain meaning of the language used in the original ordinance. Applying the plain meaning rule to Denver's "space actually used" argument, the Court of Appeals found that because the language of the ordinance did not distinguish between subleased space, unused space and used space in determining whether a facility met the ordinance's square footage requirements, it would be improper for a court to read such a limitation into the ordinance. Thus, the Court of Appeals found the district court had also violated the plain meaning rule by reading a distinction between used and unused space into the ordinance. (*Id.* at A10-A12.) Turning to the reserve fund requirement, the Court of Appeals ruled that the district court had committed error by holding the reserve requirement applicable to Continental. Again, the Court of Appeals found the district court had ignored the plain language of the ordinance, which plainly provided that the reserve fund requirement was not applicable to a facility (like Continental's) in existence at the time the original ordinance was adopted. (*Id.* at A10-A14.)

Finally, the Court of Appeals found that Denver's attempt to change the definition of a qualifying facility retroactively did indeed violate the state constitutional prohibition against retroactive legislation. Accordingly, it found that, under state law, Denver's enactment of the so-called clarifying ordinance did not vitiate Continental's entitlement to the exemption under the terms of the original ordinance. (*Id.* at A14-A17.)

Argument

1. Petitioner implies that review is necessary to avoid future conflict between the opinion of the Court of Appeals and other courts concerning rules of statutory construction. That assertion is incorrect. The Court of Appeals designated its opinion as "not for publication". Under United States Court of Appeals for the Third Circuit, Internal Operation Procedures, Rules 5.1.3 and 5.5.1, an opinion designated as "not for publication" has precedential value only for the trial court and parties. Thus, there is no realistic possibility of any future conflict between the opinion of the Court of Appeals and the opinion of any other court.

2. Petitioner's assertion that the decision of the Court of Appeals is in conflict with decisions of other federal courts of appeal and of this Court concerning rules of statutory construction is also incorrect. The decisions of the other federal court of appeals and this Court cited by Petitioner involve questions of federal law or the law of other states. None of those decisions involves Colorado law, which was the sole basis for the opinion of the Court of Appeals. Thus, Petitioner has failed to demonstrate the existence of any conflict between the decision of the lower court and the decisions of other federal courts of appeal or this Court.

3. Petitioner's assertion that the decision of the Court of Appeals is in conflict with Colorado law is also incorrect. On the issue of statutory construction, the Colorado Supreme Court has repeatedly stated that resort to extrinsic materials is unnecessary and inappropriate where statutory language is clear and the legislature's

intent can be ascertained by construing the terms actually used in a piece of legislation in accordance with their ordinary and common usage.

Thus, for example, in *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991), the Colorado Supreme Court stated that under Colorado law, a court's task in construing a statute is to "determine the intent of the legislature as expressed in the language it selected." (*Id.* at 644.) Similarly, in *Kane v. Town of Estes Park*, 786 P. 2d 412 (Colo. 1990) the court stated that the legislature's intent is to be determined by "look[ing] first to the statutory language. When the statutory language is plain, our inquiry need go no farther." (*Id.* at 415.) In *City of Littleton v. Board of County Commissioners*, 787 P.2d 158 (Colo. 1990), the court reiterated that determining legislative intent is a court's primary task when interpreting a statute, and that the proper way to go about determining legislative intent is to first look at the language of the statute. (*Id.* at 161.) All of these cases referred to *Kern v. Gebhardt*, 746 P.2d 1340 (Colo. 1987), where the state supreme court succinctly summarized Colorado law on this issue:

> Our primary task in construing a statute is to determine and give effect to the intent of the General Assembly. . . . To discern legislative intent, we look primarily to the language of the statute itself and then give effect to the statutory terms in accordance with their commonly accepted meaning. . . . When the statutory language is plain, it should not be subjected to a strained or forced interpretation.

Id. at 1344 (citations omitted).

The approach approved by *Triad Painting Co., Kane, City of Littleton* and *Gebhardt* is precisely the approach taken by the Court of Appeals. Looking at the language of the statute, the court found that the term "facility" did indeed have a plain and ordinary meaning, and that meaning – as reflected in legal and other dictionaries – plainly encompassed a multi-building complex used to perform a common function. (*See* Appendix A at A10-A12.) Accordingly, the court rejected Petitioner's attempt to qualify the term "facility" through the use of extrinsic evidence.

Similarly, the Court of Appeals rejected Petitioner's attempt to read qualifications into the square footage requirement not found in the language of the ordinance, and to apply the reserve fund requirement to Colorado when the statutory language plainly did not extend that requirement to facilities already in existence when the ordinance was passed.

Thus, it is incorrect to say that the decision of the Court of Appeals somehow ignored controlling Colorado case law and is therefore in conflict with state court decisions. To the contrary, the Court of Appeals followed controlling case law, and therefore its opinion could not have been, and was not, in a conflict with controlling state court decisions.

Denver's assertion that the Court of Appeals erred when it interpreted the state constitutional prohibition against retroactive legislation is also incorrect. Again, the

Court of Appeals looked to the leading state court decisions defining retroactive legislation, and applied those decisions to the facts of the case.

The leading Colorado decision on this issue was *P-W Invs., Inc. v. City of Westminster*, 655 P.2d 1365 (Colo. 1982) (which followed the definition of retroactive legislation first announced in *Denver, South Park & Pacific Ry. Co. v. Woodward*, 4 Colo. 162 (1878)), and *Van Sickle v. Boyes*, 797 P.2d 1267 (Colo. 1990), which follows *P-W Invs.* and *Woodward*. All of these decisions define retroactive legislation as encompassing an effort to "attach[ ] a new disability, in respect of transactions or considerations already past". The Court of Appeals found that Denver's attempt to rewrite the original ordinance was an obvious attempt to impose a tax on a transaction that was tax-free when completed, and therefore fell squarely within the prohibition against retroactive legislation articulated by Colorado's state courts.

The Court of Appeals also considered, and rejected, Petitioner's attempt to narrow the definition of retroactive legislation followed by Colorado courts since 1878. Thus, the Court found that Petitioner's argument that the ordinance seeking to make a retroactive change in the definition of "facility" was merely a "clarifying" ordinance, lacked credibility, and also found *Martin v. Board of Assessment Appeals*, 707 P.2d 348 (Colo. 1985), upon which Petitioners rely, to be distinguishable. The Court of Appeals recognized that *Martin* upheld a mid-year change in property tax rates against a retroactivity challenge. It found, however, that *Martin* was not applicable to the use tax controversy for two reasons. First, the transactions at issue in *Martin* were not completed at the

time the law was changed, as contrasted with the use tax transactions, which had been completed at the time the city council attempted to make a retroactive change in the scope of the exemption. Second, the change at issue in *Martin* did not involve an attempt to add a new tax liability to a discrete transaction, while the attempt to impose a tax on a transaction that was tax free when completed, obviously did.

Thus, again, it is incorrect to assert that the opinion of the Court of Appeals is in conflict with controlling state law. Rather, the opinion of the Court of Appeals shows that the court was aware of the controlling state law decisions, applied those decisions to the facts before it, and reached a conclusion that was consistent with the leading state court decisions.

Conclusion

As noted above, the Court of Appeals resolved the questions before it by applying controlling state law. Because only state law issues were decided by the Court of Appeals, its decision did not in any way involve a question of federal law or policy. Thus none of the grounds for review set forth in Supreme Court Rule 10.1 are present. Indeed, Petitioner does not even attempt to assert that the decision of the Court of Appeals implicates

any of the considerations set forth in Rule 10.1. Accordingly, as stated above, further review is neither necessary nor warranted.

Respectfully submitted,

FRANCES A. KONCILJA, ESQ.
(*Counsel of Record*)
PETER C. FORBES, ESQ.
KONCILJA & ASSOCIATES, P.C.
1700 Broadway, Suite 2050
Denver, Colorado 80202
Telephone: (303) 832-2110
Facsimile: (303) 832-2623

Attorneys for Respondent,
Continental Airlines, Inc.

February, 1994